SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 793

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ELLIOTT W. MICHENER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[Caption omitted.]

1 In District Court of the United States for the District of Minnesota, Third Division

Indictment

Filed September 19, 1935

At a stated term of the District Court of the United States of America for the District of Minnesota held at the City of Saint Paul, within and for the District and Division aforesaid, on the first Tuesday in April, being the second day of April, in the year of our Lord one thousand nine hundred and thirty-five, by a duly empaneled, charged and sworn Grand Jury of the United States of America within and for said District, it is presented in manner and form following, that is to say

UNITED STATES OF AMERICA,
DISTRICT OF MINNESOTA, FIFTH DIVISION, *set.:*

The Grand Jurors of the United States of America within and for said District in the name and by the authority of the said United States of America, upon their oaths present that heretofore, to wit, on or about August 25, 1934, at Number 316½ West First Street, in the City of Duluth, in the County of St. Louis, in the state and district of Minnesota, and within the jurisdiction of this Court, one Richard C. Franzeen and one Elliott W. Michener, then and there being, unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States, for the printing in the Bureau of Printing and Engraving of the United States, of that certain obligation of the United States, to wit, that certain ten-dollar Federal Reserve Note on the Federal Reserve Bank of Minneapolis, serial 106429062A, check letter "H," face plate No. 12, series of 1928 B, bearing the facsimile signatures of W. O. Wood, Treasurer of the United States, and A. W. Mellon, Secretary of the Treasury of the United States, a more particular description of said Federal Reserve Note being unknown to the Grand Jurors; which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that heretofore, to wit, on or about August 25, 1934, and thereafter, at the City of Duluth, in the County of St. Louis, in the state and district of Minnesota, and within the jurisdiction of this Court, one Richard C. Franzeen and one Elliott Michener, then and there being, being the identical persons

2 named in the foregoing count of this indictment, being referred to hereinafter as "defendants," unlawfully did have in their control, custody, and possession that certain plate made after and in the similitude of a plate from which genuine Federal Reserve Notes of ten-dollar denomination have been printed in the Bureau of Printing and Engraving of the United States, with intent then and there on the part of defendants to use said plate in counterfeiting Federal Reserve Notes on the Federal Reserve Bank of Minneapolis, of the denomination of ten dollars, bearing serial number 106429062A, check letter "H," face plate No. 12, series of 1928 B, and bearing the facsimile signatures of W. O. Wood, Treasurer of the United States, and A. W. Mellon, Secretary of the Treasury of the United States, a more particular description of said Federal Reserve notes being unknown to the Grand Jurors, and defendants then and there well knowing said plate to be made after and in the similitude of a plate from which genuine Federal Reserve Notes of ten-dollar denomination have been printed, as aforesaid, and defendants then and there well knowing said plate was intended for use in counterfeiting Federal Reserve Notes, as aforesaid; which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

GEORGE F. SULLIVAN,
United States Attorney.

[Endorsed: Indictment. Sec. 150 C. C. (18 U. S. C. 264). 2 counts.]

A true bill.

D. C. SHEPARD,
Foreman of the Grand Jury.

[File endorsement omitted.]

3 In the District Court of the United States

Arraignment, plea, judgment and sentence

May 12, 1936

Court opened pursuant to adjournment.

Present: Honorable ROBERT C. BELL, Judge.

No. 5349

THE UNITED STATES vs. RICHARD C. FRANZEEN and ELLIOTT MICHENER

The United States Attorney being present, defendants appear, are arraigned, and each defendant enters a plea of guilty to the indictment herein against him.

* * * * *

No. 5349

THE UNITED STATES *vs.* ELLIOTT MICHENER ET AL.

The defendant having heretofore pleaded guilty to the indictment herein against him, it is by the Court

Considered and adjudged: That said defendant, Elliott Michener, is guilty of the crime of unlawfully causing and procuring to be made a certain plate in the likeness of a plate of that certain obligation of the United States, to wit, that certain ten-dollar Federal Reserve Note on the Federal Reserve Bank of Minneapolis, serial 10642906 2A, check letter "H," face plate No. 12, series of 1928 B, as charged in the first count of said indictment, and unlawfully having in his control, custody, and possession that certain plate heretofore described in the first count, defendant well knowing said plate was intended for use in counterfeiting Federal Reserve Notes, as charged in the second count of the indictment; that as punishment therefor said defendant do pay a fine of $5,000 and be committed to the custody of the Attorney General or his authorized representative for confinement in an institution of the penitentiary type for the term of fifteen (15) years on the first count, and do pay a fine of $5,000 and be committed to said institution for the term of fifteen (15) years on the second count, and until he shall have paid said fines or been discharged from said institution by due course of law. Said terms of imprisonment shall be served consecutively, the term of imprisonment upon the second count to begin immediately upon the expiration of the term of imprisonment upon the first count. The term of imprisonment upon the first count shall begin immediately upon the expiration of the sentence defendant is now serving at the Wisconsin State Penitentiary, Waupun, Wisconsin.

4 In the District Court of the United States

[Title omitted.]

Motion to vacate judgment and sentence

Filed March 26, 1946

To the Honorable Robert C. Bell, Judge of the District Court of the United States for the District of Minnesota, Fifth Division:

Now comes Elliott W. Michener, defendant in the above entitled cause and move'nt herein, and respectfully represents:

I. That he is a citizen of the United States of legal age, and is at present confined in the United States Penitentiary at Alcatraz, California.

II. Statement of Facts and Law Involved.

That he was charged in an indictment containing two counts, filed in the district court for the aforesaid district, for violation of Section 264 of Title 18, U. S. C. A., 150 C. C.

The pertinent parts of these two counts read:

(1) "That (defendants) on or about August 25, 1934, * * * in the city of Duluth * * * did unlawfully cause and procure to be made a certain plate in the likeness of a plate designated * * * for the printing of a * * * certain ten-dollar Federal Reserve Note * * *."

(2) "That (defendants) on or about August 25, 1934, and thereafter, at the city of Duluth, * * * unlawfully did have in their control, custody and possession that certain plate (same plate) * * * with intent then and there on the part of defendants to use said plate in counterfeiting Federal Reserve Notes * * *."

The statute these counts are predicated on reads, in pertinent part:

(Section 264) (1) "* * * or whoever by any way, act, or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; * * *."

5 (2) "* * * or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; * * *."

Upon arraignment the defendant pleaded guilty, and the following sentence was imposed: Fifteen years imprisonment and a fine of $5,000 on Count One, and a like fifteen years imprisonment and $5,000 fine on Count Two; such sentences to be served consecutively.

It is under the first of these sentences that the defendant, and movent herein, is now being restrained.

GROUNDS FOR MOTION, AND JURISDICTION THEREOF

Movent now applies for the vacation of judgment and sentence on Count Two, for the reason that arraignment upon that Count was in violation of the former jeopardy clause as set forth in the Fifth Amendment to the Constitution of the United States, and that said judgment and sentence are thereby void.

Jurisdiction in this motion is conferred on this Honorable Court under the provisions of Section 377 of Title 28, U. S. C. (Holiday v. Johnson, 313 U. S. 342).

PRAYER

Wherefore, movent respectfully prays that this Honorable Court grant this motion.

Dated this 25th day of March 1946.

Respectfully submitted.

ELLIOTT W. MICHENER,
Movent, In propria persona.

[*Duly sworn to by Elliott W. Michener; jurat omitted in printing.*]

PROOF OF SERVICE

The above-named defendant-movement has placed in the
6 United States mails a copy of the foregoing motion, addressed to the United States Attorney for the above-stated district.

Subscribed and sworn to before me this 26th day of March 1946.

[SEAL] H. W. WENIHFEL, (?)
Acting Associate Warden
United States Penitentiary,
Alcatraz, California.

Warden-Associate Warden Authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Elliott W. Michener is a citizen of the United States.

[File endorsement omitted.]

7 In the District Court of the United States

[Title Omitted.]

Brief in support of motion to vacate void judgment and sentence

Filed March 26, 1946

STATEMENT OF CASE.

The indictment upon which the defendant was arraigned and sentenced on May 12, 1936, in the above named court, contains two counts charging violation, at the same time and place, of two provisions of Section 264, Title 18, U. S. C. A., 150 C. C.

The first count charged a violation of that provision which reads:

"* * * whoever by any way, act, or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designed for the printing of such obligation; * * * shall be fined, etc."

(It should here be noted that "to make" and "to cause and procure to be made" are one and the same offense. See Section 332, Criminal Code (Comp. St. Par. 10506).)

The second count charges a violation of that provision which reads:

"* * * whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in counterfeiting any such obligation, or any part thereof; * * * shall be fined, etc."

The movant submits that the same evidence which proves a violation of the first provision (against manufacture) is in itself sufficient to prove a violation of the second provision (against (1) possession of a plate with (2) the intent that it be used or suffered to be used in printing counterfeit notes).

This is true because:

(1) *Manufacture proves possession.*

Tritice v. U. S., 4 F (2d) 644 (C. C. A. 5).

Patrilo v. U. S., 7 F. (2d) 805 (C. C. A. 8).

8 And (2) Unlawful manufacture shows unlawful possession; and unlawful possession of counterfeiting implements is held prima facie evidence of an intent to use such implements for counterfeiting.

In Baender v. U. S., 260 Fed. 832, 40 S. Ct. 396, 252 U. S. 586, it is ruled:

"An indictment charging the defendant with a violation of this section (283) in having in his possession certain dies for making counterfeit money, need not allege that he had possession of the dies with the intent to defraud or to use the same in making counterfeit money. A criminal intent is to be inferred from the unlawful possession, and need not be averred."

It should be pointed out here that unlawful manufacture, by showing the source of the plate and by establishing guilty knowledge with certainty precludes use of the one reasonable defense available to a defendant charged with unlawful possession alone.

For where the possesser might possibly be able to plead an ignorant or innocent holding of the plate for someone else, the manufacturer and possessor will be able to offer no credible defense at all.

From this it follows that a presumption legally sufficient to establish criminal intent on the basis of unlawful possession alone, must, on being applied to manufacture and possession, become practically conclusive. And in all but theory it is conclusive. For it is based upon the practical logic, obvious to any juror, that a plate unlawfully made can serve no lawful function, and that it has only a single unlawful one, i. e., the printing of counterfeit notes.

This point is recognized in Kaye v. U. S., 147, 177 F. (C. C. A. 7): "The making of counterfeit implements is inherently wrong. * * * The intent to use such molds fraudulently or unlawfully should be assigned to the intent to use them for the making of counterfeit coins."

The movant's original proposition has therefore been fully established. It has been shown that evidence of manufacture is (1) sufficient to prove possession, and (2) constitutes the best possible prima facie proof of the required criminal intent.

It is the duty of the court, therefore, to recognize that the movant has been twice tried and punished for the same offense. For the indictment in his case charged possession as occurring at the time and place of manufacture, and since possession is a continuous offense which may not be made multiple by arbitrary division, it is contained within the crime of manufacture and is an "included offense," for which a separate consecutive sentence cannot stand.

Reynolds v. U. S., 280 F. 1 (C. C. A. 6).
Morgan v. U. S., 294 F 82 (C. C. A. 4).
Hewitt v. U. S., 110 F. (2d) 1 (C. C. A. 8).

NOTE ON DOUBLE JEOPARDY TESTS

In Grafton v. U. S., 27 S. Ct. Rep., 755, the Supreme Court declined "to attempt to formulate any rule by which every conceivable case must be solved." In this respect it should be held in mind that when one offense is included within another (as assault, with assault and battery) the two offenses are not, and cannot be, identical, for the part cannot equal the whole; and that therefore a rule which is designed to test the identity of offenses may not always easily discover whether or not the one offense is included within the other.

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9 (For examples, see U. S. v. Harris, D. C. 26 F. Supp. 788; also, the criticism of it in Hewitt v. U. S., 110 F. (2d) 1 (C. C. A. 8).

Tests of former jeopardy have been collected in 1 N. Cr. L., Section 1048, by Bishop. "Offenses are the same," he concludes, "whenever evidence adequate to sustain one indictment will equally sustain the other. Moreover, if the two indictments set out like offenses and relate to one transaction, yet if one contains more of a criminal charge than the other, but upon it there could have been a conviction for what was embraced in the other, the offenses, though of different names, are, within our constitutional guaranty, the same."

CONCLUSION

The movant submits that a fair and reasonable interpretation of the Fifth Amendment's prohibition against the individual being twice tried and punished for the same offense necessitates a single sentence in his case, and that the sentence on Count Two for possession be vacated, or so modified as to run concurrently with the sentence on Count One.

Respectfully submitted.

ELLIOTT W. MICHENER.

[File endorsement omitted.]

10 In the United States District Court

[Title omitted.]

Notice of motion and motion of United States of America to dismiss defendant's motion to vacate judgment and sentence as to him

Filed April 12, 1946

To ELLIOTT W. MICHENER, Defendant:

You will please take notice, that the undersigned attorneys for the plaintiff will make a motion before the Honorable Robert C. Bell, one of the Judges of the above-named Court, on the 22nd day of April 1946, at 10:00 A. M. of that day, or as soon thereafter as counsel can be heard, in his Courtroom in the Federal Courts Building at St. Paul, Minnesota, for an Order to dismiss your motion to vacate the judgment and sentence imposed on the second count of the Indictment, as to you, which said motion was dated March 25, 1946, and filed herein on March 26, 1946, at Duluth, Minnesota, on the ground that your motion fails to set forth any facts that would entitle you to the relief asked for in your motion, and on the further ground that the sentence imposed and the

judgment entered herein against you on the second count of said indictment was and is a lawful and subsisting judgment.

The plaintiff's motion to so dismiss will be based upon the files and records herein and upon your said motion.

Dated, this 11th day of April 1946.

Victor E. Anderson,
VICTOR E. ANDERSON,
United States Attorney,

James J. Giblin,
JAMES J. GIBLIN,
Assistant United States Attorney,

Attorneys for Plaintiff,
221 Federal Courts Building,
St. Paul 2, Minnesota.

[File endorsement omitted.]

11 JJG:hjn.
10-5924B.

APRIL 11, 1946.

Re: United States v. Elliott W. Michener, No. 5349 Cr.—Fifth Division

MR. ELLIOTT W. MICHENER,
United States Penitentiary,
Alcatraz Island, California.

DEAR SIR: I enclose a copy of our Notice of Motion and Motion to Dismiss your Motion, dated March 25, 1946, to vacate the judgment and sentence imposed on the second count of the indictment.

You will notice that we are bringing the matter on for hearing before Honorable Robert C. Bell, United States District Judge, at St. Paul, Minnesota, on the 22nd day of this month, at 10:00 A. M.

We suppose that you desire to have the matter submitted on your brief, which was attached to your Motion.

Yours very truly,

VICTOR E. ANDERSON,
United States Attorney.

Enc.

12 In the United States District Court

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ELLIOTT W. MICHENER, DEFENDANT

Order denying and dismissing motion to vacate judgment and sentence

April 22, 1946

The affidavit of the above named defendant Elliott W. Michener dated March 25, 1946, to which was attached his Statement of Case, authorities and arguments were filed herein on the 25th day of March 1946; that he therein moved to vacate the judgment and sentence that had been entered and pronounced in Federal Court, Duluth, Minnesota, on May 12, 1936, on the second count of an indictment in two counts charging violations of Title 18, U. S. C. A. 264, relating to counterfeiting; that on the 11th day of April 1946, the United States Attorney for the District of Minnesota, responded by Notice of Motion and Motion to Dismiss the Defendant's Motion and the same was filed herein on April 11, 1946, and a copy thereof on that date duly mailed to the said defendant Elliott W. Michener and addressed to him at the United States Penitentiary at Alcatraz Island, California.

And the matter having been duly brought on for hearing before the undersigned Judge at St. Paul, Minnesota, in Federal Court at St. Paul, Minnesota, on this 22nd day of April 1946, being a Special Term day, James J. Giblin, Assistant United States Attorney, appearing for the plaintiff, and there being no appearance for the defendant: and the Court having heard the statement of the United States Attorney in opposition to the defendant's Motion and having considered the defendant's Motion and his brief in support thereof which was attached to his Motion, and being fully advised in the premises,

It is ordered that the said motion of said Elliott W. Michener to vacate the sentence and judgment of this Court entered on May 12, 1936, herein with respect to the second count of the Indictment herein, be and the same is in all things denied and dismissed.

And the Clerk of the above named Court is directed to send a copy of this Order by mail forthwith to the said defendant addressed to him at the United States Penitentiary, Alcatraz Island, California.

Dated April 22, 1946.

Robert C. Bell,
ROBERT C. BELL,
United States District Judge.

[File endorsement omitted.]

13 In the District Court of the United States

[Title omitted.]

Notice of appeal

Filed April 29, 1946

Notice is hereby given that Elliott W. Michener, the defendant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit, from the Order denying the defendant's Motion to Vacate Void Judgment and Sentence, as entered in this District Court on Apr. 22, 1946.

Elliott W. Michener,
ELLIOTT MICHENER.

Dated April 26, 1946.

GROUNDS FOR APPEAL

The defendant has been punished twice for the same offense, in that the offense set out in Count One of his indictment included every element of the offense set out in Count Two.

[File endorsement omitted.]

14 MAY 13, 1946.

Mr. E. E. KOCH,
Clerk, U. S. Circuit Court of Appeals,
St. Louis, Mo.

DEAR MR. KOCH: Adverting to my letter to you of the 11th instant on the subject of Elliott W. Michener, Alcatraz inmate, I would now advise you that Judge Bell has directed me to proceed in this matter, in accordance with the provisions of the new criminal Rule No. 37.

I, therefore, respectfully enclose herewith, pursuant to said rule, duplicate of Michener's Notice of Appeal, together with a statement of the docket entries in his case.

Yours very faithfully,

THOMAS H. HOWARD,
Clerk, U. S. District Court.

THH:MAP.
Encl.

15 In the District Court of the United States

[Title omitted.]

Praecipe for record

Filed May 3, 1946

To the Clerk of the above-named Court:

You are hereby requested to prepare and send to the Clerk of the U. S. Court of Appeals for the Eighth Circuit, at St. Louis, Mo., the following records, to wit:

1. Indictment and Judgment in Criminal Case No. 5349.
2. Motion to Vacate Judgment and Sentence, as filed March 26, 1946.
3. Order denying said Motion.
4. Notice of Appeal.
5. Assignment of Errors.

Said records to be prepared according to the rules prescribed for such cases.

Respectfully submitted.

Elliott W. Michener,
ELLIOTT W. MICHENER,
Alcatraz, California.

[File endorsement omitted.]

16 In the District Court of the United States

[Title omitted.]

Assignment of errors

Filed May 3, 1946

On March 26, 1946, the defendant in the above-entitled cause filed in this Court a Motion to Vacate Judgment and Sentence on the second count of his indictment. On April 22, 1946, an Order was entered by this Court, denying said Motion.

In entering this Order:

1. The United States District Court erred in failing to find that the offense set out in Count Two was included within the offense set out in Count One.
2. The United States District Court erred in failing to vacate judgment and sentence on Count Two.

Respectfully submitted.

Elliott W. Michener,
ELLIOTT W. MICHENER,
Appellant, Alcatraz, California.

[File endorsement omitted.]

17

Mr. James J. Giblin, May 13, 1946
Assistant U. S. Attorney,
Federal Courts Building, St. Paul, Minnesota.

Dear Mr. Giblin: Pursuant to Judge Bell's direction to me to proceed under new criminal Rule No. 37 on the appeal taken by Alcatras inmate, Elliott W. Michener, from this Court's Order denying his motion to vacate judgment and sentence entered on May 12, 1936, I now respectfully enclose herewith copy of Michener's Notice of Appeal, in accordance with the provisions of Rule No. 37.

There is also respectfully enclosed herewith copy of this appellant's so-called "praecipe for records," which I am interpreting as his "designation of contents of record on Appeal," called for by Civil Rule No. 75, which rule I understand governs the record on appeal even in a criminal proceeding (see new criminal Rule No. 39 (b) (1)). While Civil Rule No. 75 provides that the appellant shall serve this designation on the appellee, I am assuming that under the circumstances in this case you will probably consider my mailing to you the copy of this designation as constituting such service. If you are in accord with this suggestion, then I will delay further preparation of such record for ten days to permit of your filing with me a counter designation, which action on your part, under the circumstances in this case, could be regarded as service on the appellant.

You will understand, of course, that in the preparation of this record I shall also be governed by the direction to the Clerk contained in Civil Rule No. 75 (g).

Yours very faithfully,

Thomas H. Howard,
Clerk, United States District Court.

THH: MAP.
Encl.

18 In the United States District Court

[Title Omitted.]

Designation by appellee of additional portions of the record to be contained in the record on appeal

Filed May 16, 1946

To the Clerk of the above-named Court:

In addition to the records designated by the appellant to be contained in the record on appeal to the Eighth Circuit Court of Appeals, the appellee hereby designates the following:

(1) Notice of Motion, and Motion of the United States of America, dated April 11, 1946, to dismiss defendant's motion to vacate judgment and sentence as to him, Elliott W. Michener, together with a copy of letter attached thereto, dated April 11, 1946, addressed to Mr. Elliott W. Michener, United States Penitentiary, Alcatras, California, by Victor E. Anderson, United States Attorney.

(2) Appellant's praecipe for record filed May 3, 1946 (treated as designation of contents of record on appeal under Rule 75 (a), Rules of Civil Procedure, and Rule 39 (b), Rules of Criminal Procedure).

(3) Appellee's designation of additional portions of record.

Dated at St. Paul, Minnesota, May 16, 1946.

UNITED STATES OF AMERICA, *Appellee.*

By Jas. J. Giblin,

JAMES J. GIBLIN,

Asst. United States Attorney,

District of Minnesota.

[File endorsement omitted.]

19 In the District Court of the United States

[Title omitted.]

Order extending time for filing and docketing transcript

June 3, 1946

Ordered: That the time for filing and docketing the Transcript on Appeal from the Order denying motion to vacate judgment and sentence in the above case be, and it hereby is, extended to and including June 20, 1946.

ROBERT C. BELL,

United States District Judge.

Dated: June 3rd, 1946.

20 [Clerk's certificate to foregoing transcript omitted in printing.]

21 In United States Circuit Court of Appeals, Eighth Circuit

No. 13375—May Term, 1946

ELLIOTT W. MICHENER, APPELLANT

vs.

UNITED STATES OF AMERICA

Appeal From the District Court of the United States for the District of Minnesota

Order granting leave to appellant to proceed with appeal in forma pauperis and to be heard on typewritten record and brief

May 17, 1946

The Court having considered the motion and affidavit of appellant for leave to file transcript of record in forma pauperis and for leave to proceed on typewritten brief, and duplicate notice of appeal and certified statement of docket entries having been received from the Clerk of said District Court, It is now here Ordered that the appellant be, and he is hereby, granted leave to proceed with his appeal in this Court as a poor person, without prepayment of any fees or costs to the Clerk or other officers of this Court.

And it is further Ordered by this Court that the appeal herein be heard and determined upon the certified typewritten transcript of record from the District Court, and appellant is also granted leave to be heard upon typewritten brief, of which five clearly type copies should be filed with the Clerk of this Court, and one of these copies should be served upon counsel for the appellee.

22 In United States Circuit Court of Appeals

Appearance of counsel for appellee

Filed May 25, 1946

The Clerk will enter my appearance as Counsel for the Appellee.

VICTOR E. ANDERSON,
United States Attorney.
JAS. J. GIBLIN,
Asst. U. S. Attorney,
221 Fed. Courts Bldg., St. Paul, Minn.

[File endorsement omitted.]

23 In United States Circuit Court of Appeals

Order of submission

September 5, 1946

This cause having been called for hearing in its regular order and no counsel appearing for appellant the same was argued by Mr. James J. Giblin, Assistant United States Attorney, for appellee.

Thereupon, this cause was submitted to the Court on the typewritten transcript of record from said District Court, typewritten brief of appellant, printed brief of appellee and typewritten reply brief of appellant.

24 In United States Circuit Court of Appeals,
Eighth Circuit

No. 13375

ELLIOTT W. MICHENER, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Minnesota

Mr. Elliott W. Michener, Per Se, on brief for Appellant.

Mr. James J. Giblin, Assistant United States Attorney (Mr. Victor E. Anderson, United States Attorney, was with him on the brief), for Appellee.

Before GARDNER, WOODROUGH, and RIDDICK, Circuit Judges.

Opinion

October 23, 1946

GARDNER, Circuit Judge, delivered the opinion of the Court.

This is an appeal from an order denying appellant's motion to vacate the sentence imposed and the judgment entered on the second count of an indictment. The motion was based
25 upon the ground that the arraignment upon the second count of the indictment was in violation of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. The indictment, drawn under Section 264, Title 18, U. S. C. A., was in two counts. Count 1 charged that

appellant and a co-defendant "unlawfully did cause and procure to be made a certain plate in the likeness of a plate designated and prepared by the direction of the Secretary of the Treasury of the United States, for the printing in the Bureau of Printing and Engraving of the United States, of that certain obligation of the United States; to-wit, * * *." Then followed a description of the plate. The second count charged that at the same time and place, appellant and his co-defendant "unlawfully did have in their control, custody and possession that certain plate made after and in the similitude of a plate from which genuine Federal Reserve Notes of ten-dollar denomination have been printed in the Bureau of Printing and Engraving of the United States, with intent then and there on the part of defendants to use said plate in counterfeiting Federal Reserve Notes on the Federal Reserve Bank of Minneapolis, * * *." Then followed a description of the obligation, being identical with the description set out in Count 1 of the indictment. From the facts disclosed by the indictment and those admitted with commendable frankness by the government's attorney on oral argument, it is clear that there was but one plate involved.

To this indictment appellant pleaded guilty and upon such plea he was sentenced to a term of fifteen years and a fine of $5,000.00 on each count, the sentences to be served consecutively.

On this appeal appellant urges that he has been twice placed in jeopardy for the same offense in that the same
26 evidence which proves Count 1 will sustain a conviction on Count 2.

The statute under which the indictment was drawn, omitting parts not here material, reads as follows:

"* * * whoever by any way, art, or means shall make or execute, or cause or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or whoever shall have in his control, custody, or possession any plate, stone or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other

security, or any part thereof, * * * shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both." (Sec. 264, Title 18, U. S. C. A.)

It is argued by appellant that one can not make, cause or procure to be made a mechanism such as is described in Count 1, without having control, custody and possession of it, and that the offense of unlawful possession is complete at the moment of possession and that such possession is a continuing offense, not augmented because it may continue for more than a day, nor subject to arbitrary division into separate offenses or periods of time. We agree with appellant that he could not have made or procured to be made, the plate described in this indictment without having possession of the plate. Patrilo v. United States, 8 Cir., 7 F. 2d 805; Morgan v. United States, 4 Cir., 294 F. 82. If he procured it to be made, the person making it for him was his agent and he was in constructive possession when the plate was completed by his procurement. Richardson v. United States, 3 Cir., 181 F. 1; Moffitt v. United States, 10 Cir., 154 F. 2d 402; United States v. DeNormand, 2 Cir., 149 F. 2d 622. If he made it himself, he was of necessity in possession of the plate when it was completed.

27

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test usually applicable, and the one which appellant here invokes to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Hewitt v. United States, 8 Cir., 110 F. 2d 1; Roark v. United States, 8 Cir., 17 F. 2d 570; Spencer v. Cox, 8 Cir., 140 F. 2d 73. The test of identity of offenses is whether the same evidence is required to sustain them. If it is not, then the mere fact that both charges relate to and grow out of one and the same transaction does not necessarily make a single offense where two are defined by the statute. There need not, however, be formal, technical, absolute identity, but substantial identity is sufficient. To sustain the plea of double jeopardy, it must appear that appellant upon the first charge could have been convicted of the offense in the second. The possession with which appellant is charged in the second count resulted from and was an incident to the act charged in the first count. In other words, he became possessed of this plate by the unlawful act of making it or procuring it to be made. There was but one transaction and one plate and the act of procuring possession was an integral part of the unlawful act of creating this plate.

28

There can be no doubt but that separate offenses might be charged and proved under this statute, but that does not solve the question here presented. We must interest ourselves not

with what might have been done, but what was actually done in this case. As said by Judge Faris, speaking for this court in Cain v. United States, 19 F. 2d 472.

"The trouble is not with the law but with the facts. This possibility of a violation of either statute by wholly different acts is readily demonstrable. Many of the cases seem to make the latter possibility the test which saves the situation from double jeopardy. We think, however, it is a question of what was actually done rather than a question of what might have been done. Defendant concededly might have made a sale of morphine through the mail, or he might have sent morphine through the mail, or shipped it by express or by freight, and thus have been guilty on the second count, without making a sale."

So in the instant case, it may be conceded that under a possible state of facts one could properly be convicted of the two offenses charged in the indictment, but as stated by Judge Faris in Cain v. United States, supra, "It is a question of what was actually done, rather than a question of what might have been done." This thought is expressed by Judge Rutledge, now Mr. Justice Rutledge, in a concurring opinion in District of Columbia v. Buckley, 128 F. 2d 17, where, in referring to the evidence type of test, he says,

"The test is useful to spell out the elements of the crimes charged, and therefore to disclose what, if any, difference exists between them. If there is none that ends the matter. But if difference is disclosed there is in my view always another step which must be and is taken either intuitively or with deliberation. That is to weigh the difference to determine whether it is substantial or too minor to be material for purposes of double jeopardy. The court must evaluate as well as spell out the difference, and
29 determine whether the element it affects is sufficiently important in relation to other elements involved in both crimes to justify refusal to apply the constitutional protection."

Substantially the same test is suggested by the Circuit Court of Appeals of the Seventh Circuit, in the case of Murphy v. United States, 285 F. 801, where in an opinion by Judge Evans it is said,

"The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution."

Congress may create separate and distinct offenses growing out of the same transaction but where it is necessary in proving one offense, to prove every essential element of another growing out of the same act, a conviction of the former is a bar to a prosecution for the latter. The rule is well stated in Bishop, 1 N. Cr. L., Section 1048, as follows:

"Offenses are the same whenever evidence adequate to sustain one indictment will equally sustain the other. Moreover, if the two indictments set out like offenses and relate to one transaction, yet if one contains more of a criminal charge than the other, but upon it there could have been a conviction for what was embraced in the other, the offenses, though of different names, are, within our constitutional guaranty, the same."

In Patrilo v. United States, supra, Patrilo and others were convicted of possessing property intended for unlawful manufacture, distillation and production of intoxicating liquor and of unlawfully manufacturing intoxicating liquor. The court held that the charge of possession was included in the charge of manufacturing. In the course of the opinion it is said,

"But conceding that the proof would have supported a verdict of guilty on the first count as against all three defendants, because they were all in the joint possession of the still and mash, within the meaning of section 25, they could not also be convicted and punished on the second count, for the reason that the offense charged therein embodied the offense charged in the first count. The two charges are of the same date and the evidence deals with but one occasion, when the police officers went to Patrilo's place."

The court quotes with approval from Tritico v. United States, 5 Cir., 4 F. 2d 664, as follows:

"* * * it must be apparent at once that proof of possession of distillery apparatus would necessarily have to be included in order to prove the manufacture of liquor, because such manufacture would otherwise be impossible. Likewise the same evidence which proved manufacture of liquor proved possession of it, because, upon the manufacture being completed, the liquor necessarily came into the control or possession of the manufacturer. It can make no difference whether separate charges are tried together or at different times. If the defendants had been tried for manufacturing liquor, they could not afterwards have been prosecuted for possessing the apparatus necessary for such manufacture or for possessing the liquor so manufactured."

See, also: Reynolds v. United States, 6 Cir., 280 F. 1; Morgan v. United States, supra; Murphy v. United States, supra; Stevens v. McClaughry, 8 Cir., 207 F. 18.

But it is argued that the possession to be criminal must have been "with intent to use such plate * * * or suffer the same to be used, in the forging or counterfeiting any such obliga-
31 tion or other security, or any part thereof." Mere possession is not made a crime by this statute. That possession would be innocent were it not possessed with intent to use the plate in counterfeiting.

We must therefore consider whether the conceded facts involved in the offense charged in Count 1 were sufficient to show that appellant's possession was with intent to use the plate for counterfeiting. Intent is a mental condition, invisible to human eyes, and is rarely susceptible of direct proof. The criminal does not ordinarily proclaim or announce in advance his intention to commit a crime. Intent, like any other fact, may be proved by circumstantial evidence (Majestic Securities Corp. v. Commissioner, 8 Cir., 120 F. 2d 12; State v. Gardner, Mont., 249 P. 574; 20 Am. Juris. Sec. 340), and ordinarily must be implied from the proven facts and circumstances, including the actions of the person whose intent is in question. It is inferable whenever the means used are such as would ordinarily result in the commission of the forbidden act. This is too elementary to warrant the citation of authorities. Proof of the possession of this plate by one who had unlawfully produced it, in connection with the character of the plate, was, unexplained, not only prima facie proof of criminal intent, but convincing evidence of it. As has been observed, the act of making this plate was an unlawful act, and it came into possession of the appellant by reason of this unlawful act. Evidence of the unlawful making and the resulting possession was competent proof going to the question of intent. The possession resulted from the committing of the crime described in the first count. The plate on its face disclosed its purpose, and the facts were ample to sustain proof of the allegation that appellant's possession was for the purpose of counterfeiting. It is scarcely conceivable that any other or additional facts could have been adduced in support of that allegation.

32 Strictly speaking, the erroneous imposition of two penalties for a single offense does not constitute double jeopardy. The sentence is void as to the excess and in such circumstances the remedy is to apply to vacate the sentence and for re-sentence, or to correct the sentence by eliminating the excess. Holiday v. Johnston, 313 U. S. 342; White v. Pescor, Warden, 8 Cir., 155 F. 2d 902.

The conclusion which we have reached is in conflict with certain decisions of the Ninth Circuit, notably Matthews v. Swope, 111 F.

2d 697, and later decisions of that court which followed the doctrine of the earlier decision. In Matthew v. Swope, supra, appellant pleaded guilty to two counts of an indictment charging violation of Section 264, Title 18 U. S. C. A., the sentences to run consecutively. In referring to the contention of double jeopardy, the court said,

"Appellant further urges that he was subjected to 'double jeopardy' because the facts alleged in Counts One and Two of the California indictment constitute but a single offense; that the plates, negatives and prints which Count One charged that he made or caused to be made, are the same plates which Count Two charges that he possessed. Since the proof necessary to support the first count is different from and additional to that required to support the second count, we must hold against appellant, for the rule is 'where two offenses are charged having relation to the same matter of transaction there is no double jeopardy in making and trying the charges, if each offense requires proof of a fact which the other does not.' Remaley v. Swope, 9 Cir., 109 F. 2d 31–33."

This is all that was said by the court and it will be observed that the court assumed that the proof necessary to support the first count was different from and additional to that required to support the second count. In the instant case the first count is not
33 assailed, but the contention here is that proof of the first count also established the offense charged in the second count. In the instant case, confessedly, proof that would only support the second count would not necessarily be sufficient to support the first. It does not follow, however, that it will require any evidence in addition to that necessary to sustain the first count, to convict under the second count. It is our view that proof that appellant made the plate, or procured it to be made, likewise proved that he had possession of it. Apparently, the Swope case does not agree with this view. It, however, without discussing the question, simply assumes that evidence to sustain one of the counts would not be sufficient to sustain the other, and if correct in this conclusion it would, of course, follow that conviction on each count would not result in double jeopardy.

In Michener v. Johnston, 9 Cir., 141 F. 2d 171, in considering the question of double jeopardy, the court said,

"It is claimed that the first count of the indictment involved every element contained in the second, and that the petitioner after conviction on the first count would, if he were convicted on the second, be subject to double punishment for a single offense. This court held the contrary in Matthews v. Swope, 9 Cir., 111 F. 2d 697. * * * It is argued that the decision in Matthews v.

Swope was in error, in that proof of manufacture necessarily required also proof of possession. We need not stop to consider the point. In the present situation the petitioner was charged in the first count only with 'causing and procuring' the plate to be made. Proof of that count did not necessarily involve proof of possession, and indeed the record intimates that petitioner compelled an engraver, at the point of a pistol, to make the plate. In any event there is no showing that petitioner would now be entitled to his release even though the sentence on the second count be considered void."

34 The matter was before that court in a habeas corpus proceeding and the appellant had not served his full sentence on the first count so that whatever is said on this question is dictum and in none of the decisions is the question of proof of intent considered.

We conclude that the sentence and judgment are excessive and can not stand without modification. The order appealed from is therefore reversed and the cause is remanded with directions to modify and correct the sentence and judgment by vacating that part thereof which adjudges appellant guilty under the second count of the indictment.

35 In United States Circuit Court of Appeals, Eighth Circuit

ELLIOTT W. MICHENER, APPELLANT

vs.

UNITED STATES OF AMERICA

Judgment

October 23, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the order of the said District Court denying motion of appellant to vacate the sentence imposed and the judgment entered on the second count of an indictment, in this cause, be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to modify and correct the sentence and judgment by vacating that part thereof which adjudges appellant guilty under the second count of the indictment.

36 In United States Circuit Court of Appeals

Motion of appellee to stay mandate

Filed November 6, 1946

Comes now the United States of America, appellee above named, and hereby petitions the said Honorable Court for a stay of mandate until November 22, 1946, the decision of said Court in the said proceedings having been filed on October 23, 1946, on the ground and for the following reasons, namely:

1. That the Department of Justice is of the opinion that there is a conflict of decisions between the Circuit Court of Appeals and what appears to it to be a conflict in principle between the decision in the above case and prior decisions of the United States Supreme Court, and that therefore a Petition for Writ of Certiorari to the United States Supreme Court may be determined to be desirable therein.

2. On the further ground that an extension of the stay of mandate is necessary to allow time for possible Petition for Writ of Certiorari by the United States therein.

Dated November 4, 1946.

VICTOR E. ANDERSON,
United States Attorney
for the District of Minnesota,
Attorney for Appellee.

[File endorsement omitted.]

37 In United States Circuit Court of Appeals

Order staying issuance of mandate

November 7, 1946

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

38 [Clerk's certificate to foregoing transcript omitted in printing.]

39 In the Supreme Court of the United States

Order extending time within which to file petition for a writ of certiorari

On consideration of the motion of the Acting Solicitor General in the above-entitled cause, and good cause therefor having been shown, it is now hereby ordered that the time within which a petition for a writ of certiorari may be filed herein be and the same is hereby extended for a period of thirty days from November 22, 1946.

Dated this 19th day of November 1946.

WILEY RUTLEDGE,
Associate Justice.

U. S. GOVERNMENT PRINTING OFFICE: 1948

Supreme Court of the United States

No. 793, October Term, 1946

Order allowing certiorari

Filed January 20, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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